Nos. 7 13

FILED
SEP 16 1931
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1930.

NO. 687.

CUMBERLAND COAL COMPANY, Petitioner,
v.
BOARD OF REVISION OF TAX ASSESSMENTS IN GREENE COUNTY, PENNSYLVANIA.

NO. 688.

CUMBERLAND COAL COMPANY, Petitioner,
v.
BOARD OF REVISION OF TAX ASSESSMENTS IN GREENE COUNTY, PENNSYLVANIA.

NO. 689.

CUMBERLAND COAL COMPANY, Petitioner,
v.
BOARD OF REVISION OF TAX ASSESSMENTS IN GREENE COUNTY, PENNSYLVANIA.

NO. 690.

CUMBERLAND COAL COMPANY, Petitioner,
v.
BOARD OF REVISION OF TAX ASSESSMENTS IN GREENE COUNTY, PENNSYLVANIA.

NO. 691.

HENRY A. PHILLIPS, Petitioner,
v.
BOARD OF REVISION OF TAX ASSESSMENTS IN GREENE COUNTY, PENNSYLVANIA.

NO. 692.

PIEDMONT COAL COMPANY, Petitioner,
v.
BOARD OF REVISION OF TAX ASSESSMENTS IN GREENE COUNTY, PENNSYLVANIA.

NO. 693.

GREENE COUNTY COAL COMPANY, Petitioner,
v.
BOARD OF REVISION OF TAX ASSESSMENTS IN GREENE COUNTY, PENNSYLVANIA.

On Writs of Certiorari to the Supreme Court of the State of Pennsylvania.

BRIEF OF PETITIONERS IN OPPOSITION TO MOTION OF RESPONDENTS TO DISMISS AND QUASH THE WRITS OF CERTIORARI AND TO AFFIRM THE JUDGMENT OF THE COURT OF COMMON PLEAS OF GREENE COUNTY AND THE SUPREME COURT OF PENNSYLVANIA.

WILLIAM A. SEIFERT,
ARTHUR B. VAN BUSKIRK,
Counsel for Petitioners.

W. J. KYLE,
CARL E. GLOCK,
Of Counsel,
747 Union Trust Building,
Pittsburgh, Pa.

SMITH BROS. CO. INC., LAW PRINTERS, 208-212 GRANT STREET, PITTSBURGH, PA.

INDEX.

PAGE

I. Statement of the Case in so far as Concerns Respondents' Motion to Dismiss and Affirm..... 1

II. Argument 3

Point 1. The Alleged Impairment of Petitioners' Right to Equal Protection Under the Fourteenth Amendment to the Constitution of the United States Was Specially Set Up and Claimed in the Supreme Court of Pennsylvania. 3

Point 2. The Action of the Supreme Court of Pennsylvania in Passing Upon the Federal Question Presented in the Petition for Reargument Furnishes a Proper Jurisdictional Basis for Review by This Court..... 5

Point 3. In Reality the Federal Question Was Involved in These Cases Both in the Court of Common Pleas of Greene County and in the Supreme Court of Pennsylvania 9

III. Conclusion 13

CITATIONS

Cases:

Consolidated Turnpike Co. v. Norfolk & O. V. Ry. Co., 228 U. S. 326..... 7, 8

Forbes v. State Council of Virginia, 216 U. S. 396 7

Grannis v. Ordean, 234 U. S. 385..... 7

Greene v. Louisville & I. R. Co., 244 U. S. 499.. 3, 4

Leigh v. Green, 193 U. S. 79..... 6, 7

PAGE

Mallett v. North Carolina, 181 U. S. 589..... 7
McCorquodale v. Texas, 211 U. S. 432..... 7
McKay v. Kalyton, 204 U. S. 458, 463..... 6
Sioux City Bridge Company v. Dakota County, Nebraska, 260 U. S. 441.....2, 3, 4
Sullivan v. Texas, 207 U. S. 416..... 7

Statute:
Section 237(b) of Judicial Code, as amended.. 4

Supreme Court of the United States

OCTOBER TERM, 1930.

NO. 687.

CUMBERLAND COAL COMPANY, Petitioner,
v.
BOARD OF REVISION OF TAX ASSESSMENTS IN GREENE COUNTY, PENNSYLVANIA.

NO. 688.

CUMBERLAND COAL COMPANY, Petitioner,
v.
BOARD OF REVISION OF TAX ASSESSMENTS IN GREENE COUNTY, PENNSYLVANIA.

NO. 689.

CUMBERLAND COAL COMPANY, Petitioner,
v.
BOARD OF REVISION OF TAX ASSESSMENTS IN GREENE COUNTY, PENNSYLVANIA.

NO. 690.

CUMBERLAND COAL COMPANY, Petitioner,
v.
BOARD OF REVISION OF TAX ASSESSMENTS IN GREENE COUNTY, PENNSYLVANIA.

NO. 691.

HENRY A. PHILLIPS, Petitioner,
v.
BOARD OF REVISION OF TAX ASSESSMENTS IN GREENE COUNTY, PENNSYLVANIA.

NO. 692.

PIEDMONT COAL COMPANY, Petitioner,
v.
BOARD OF REVISION OF TAX ASSESSMENTS IN GREENE COUNTY, PENNSYLVANIA.

NO. 693.

GREENE COUNTY COAL COMPANY, Petitioner,
v.
BOARD OF REVISION OF TAX ASSESSMENTS IN GREENE COUNTY, PENNSYLVANIA.

On Writs of Certiorari to the Supreme Court of the State of Pennsylvania.

BRIEF OF PETITIONERS IN OPPOSITION TO MOTION OF RESPONDENTS TO DISMISS AND QUASH THE WRITS OF CERTIORARI AND TO AFFIRM THE JUDGMENT OF THE COURT OF COMMON PLEAS OF GREENE COUNTY AND THE SUPREME COURT OF PENNSYLVANIA.

I.

STATEMENT OF THE CASE IN SO FAR AS CONCERNS RESPONDENTS' MOTION TO DISMISS AND AFFIRM.

The respondents have moved to dismiss the writs of *certiorari* granted by the Supreme Court of the United

States in these seven cases on March 9, 1931, and assigned in support of their motion various reasons, all of which are embodied in the following points argued by them in their Brief supporting the motion:

POINT I. The petitioners failed specially to set up or claim in the Pennsylvania courts any title, right, privilege or immunity under the Constitution of the United States or under any Federal Statute within the requirements of Section 237 of the Judicial Code, and this Court is without jurisdiction to entertain the present petition.

POINT II. The Supreme Court of Pennsylvania did not consider or adjudicate the Federal question on the petition for reargument as required by this Court.

POINT III. Error not assigned is not open to review in the Supreme Court of Pennsylvania.

The facts with relation to the setting up by petitioners of their claim of impairment of rights secured by the equal protection clause of the Fourteenth Amendment to the Federal Constitution, and the adjudication by the Supreme Court of Pennsylvania with respect to such rights, are as follows:

In their petition for reargument to the Supreme Court of Pennsylvania (R. 605), the petitioners assigned as grounds for a rehearing, *inter alia,* that—

"III. THE PLAN OF ASSESSMENT IN THESE CASES VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES." (R. 615).

Under this heading in their petition for reargument petitioners cited to the Supreme Court of Pennsylvania the cases of *Sioux City Bridge Co. v. Dakota County,*

Nebraska, 260 U. S. 441; *Greene v. Louisville & I. R. Co.,* 244 U. S. 499, and other Federal cases, and petitioners quoted at length from the opinion of Chief Justice Taft in the *Sioux City Bridge Company case* (R. 615-619).

On December 8, 1930, the Supreme Court of Pennsylvania entered an order, "Reargument refused" (R. 620), and on December 16, 1930, the Supreme Court of Pennsylvania entered the following order modifying the order refusing reargument (R. 620):

> "And now, December 16, 1930, the order of December 8, 1930, is modified to read as follows: Upon consideration of the petition for reargument, the court being of opinion that the plan of assessment in these cases does not violate the equal protection clause of the fourteenth amendment to the Constitution of the United States, reargument is refused.
>
> PER CURIAM."

II.

ARGUMENT.

POINT 1.

The Alleged Impairment of Petitioners' Right to Equal Protection Under the Fourteenth Amendment to the Constitution of the United States Was Specially Set Up and Claimed in the Supreme Court of Pennsylvania.

The record in these cases clearly demonstrates that the question involved both in the Court of Common Pleas of Greene County and in the Supreme Court of Pennsylvania was whether or not the assessments involved were discriminatory or lacking in uniformity. Assuming that up to the time of presenting their petition for reargument in the Supreme Court of Pennsylvania the petitioners founded their claim of discrimination solely upon

the uniformity requirements of the Constitution of Pennsylvania, nevertheless, the record shows that their petition for reargument specifically set up and fully presented their claim to protection under the Constitution of the United States. The third ground for reargument was entitled:

> "The plan of assessment in these cases violates the equal protection clause of the Fourteenth Amendment to the Constitution of the United States."

Under this heading in their petition for reargument, the petitioners cited to the Supreme Court of Pennsylvania the cases of *Sioux City Bridge Company v. Dakota County, Nebraska,* 260 U. S. 441; *Greene v. Louisville & I. R. Co.,* 244 U. S. 499, and other decisions of this Court, and quoted at length from the opinion of Chief Justice Taft in the *Sioux City Bridge Company case* (R. 615-619). It is this last mentioned decision upon which petitioners primarily relied in their application to this Court for writs of *certiorari,* and which seemingly, in the opinion of this Court, justified the granting of the writs.

Surely, under these circumstances, there can be no force in the argument that the Federal "right" upon which petitioners relied was not "specially set up" within the meaning of Section 237 (b) of the Judicial Code, as amended.

POINT 2.

The Action of the Supreme Court of Pennsylvania in Passing Upon the Federal Question Presented in the Petition for Reargument Furnishes a Proper Jurisdictional Basis for Review by This Court.

Respondents do not deny that petitioners, in their petition for reargument to the Supreme Court of Pennsylvania, expressly asserted their claim of impairment of right secured by the Federal Constitution. They do contend, however, that the claim of Federal protection having been first asserted by the petition for reargument and after the Supreme Court of Pennsylvania pronounced its final decision, came too late to sustain a review by this Court of the Federal question.

There might be substantial force in respondents' argument if the Supreme Court of Pennsylvania had refused to consider the Federal question. On the contrary, however, the Supreme Court of Pennsylvania by its modifying order of December 16, 1930 (R. 620) decreed: *"Upon consideration* of the petition for reargument, *the court being of opinion that the plan of assessment in these cases does not violate the equal protection clause of the fourteenth amendment to the Constitution of the United States, reargument is refused."* (Italics ours).

The question in these cases, therefore, is whether the Supreme Court of the United States has jurisdiction to review the action of a state court of last resort where the state court takes cognizance of the Federal question presented in the petition for reargument, and not only expresses its opinion with regard to it, but makes that opinion the basic reason for refusing a reargument. That the Supreme Court of the United States has juris-

diction to review the action of the state court under such circumstances is well settled.

In *Leigh v. Green,* 193 U. S. 79, 85, this Court, speaking through Mr. Justice Day, said:

> "A motion is made to dismiss because the claim of impairment of a right secured by the 14th Amendment was not made in the courts of Nebraska until the motion for rehearing was filed in the supreme court. We are unable to discover a specific claim of this character made prior to the motion for rehearing. In the motion reference is made to the failure of the Nebraska supreme court to decide the claim theretofore made, that the statute of Nebraska was unconstitutional because of the alleged violation of the right to due process of law guaranteed by the 14th Amendment to the Constitution of the United States. Be this as it may, the supreme court of Nebraska entertained the motion and decided the Federal question raised against the contention of the plaintiff in error. In such case the question is reviewable here, although first presented in the motion for rehearing. *Mallett v. North Carolina,* 181 U. S. 589, 45 L. ed. 1015, 21 Sup. Ct. Rep. 730."

Similarly, in *McKay v. Kalyton,* 204 U. S. 458, 463 this Court said:

> "It is contended that we are without jurisdiction because no title, right, or immunity was specially set up or claimed under any Federal statute and denied. But, leaving aside for a moment all other considerations, it is plain that the defendant below set up a claim of immunity from suit in the state court under the laws of the United States, and that the right to the immunity so asserted under

an act or acts of Congress was expressly considered and denied by the state court. True it is that the immunity which was asserted was first claimed in a petition for rehearing; but, as the question was raised, was necessarily involved, and was considered and decided adversely by the state court, there is jurisdiction. *Leigh v. Green,* 193 U. S. 79., 48 L. ed. 623, 24 Sup. Ct. Rep. 390."

To the same effect are *Mallett v. North Carolina,* 181 U. S. 589, 592; *Sullivan v. Texas,* 207 U. S. 416, 422; *Grannis v. Ordean,* 234 U. S. 385, 392.

All of the cases relied upon by respondents in support of their motion are clearly distinguishable from the instant cases. *Consolidated Turnpike Co. v. Norfolk & O. V. Ry. Co.,* 228 U. S. 326; *McCorquodale v. Texas,* 211 U. S. 432; and *Forbes v. State Council,* 216 U. S. 396, were all instances where the state court denied the rehearing without passing upon, or expressing any opinion with regard to the Federal question. In each of them, however, this Court took occasion to point out that had the state court actually passed upon the Federal question presented in the petition for rehearing, the jurisdictional requirements would have been complied with. Thus in *Forbes v. State Council of Virginia,* 216 U. S. 396, 399, the opinion of the court (quoted on page 18 of respondents' brief) states:

"It has been many times held in this court that an attempt to introduce a Federal question into the record for the first time by a petition for rehearing is too late. *Loeber v. Schroeder,* 149 U. S. 580, 585; *Pim v. St. Louis,* 165 U. S. 273.

"There is an exception to this rule when it appears that the court below entertained the motion for rehearing, and passed upon the Federal ques-

tion. But it must appear that such Federal question was in fact passed upon in considering the motion for rehearing; if not, the general rule applies. *Mallett v. North Carolina,* 181 U. S. 589; *Leigh v. Green,* 193 U. S. 79; *Corkran Oil & Development Co. v. Arnaudet,* 199 U. S. 182; *McMillen v. Ferrum Min. Co.,* 197 U. S. 343; *Waters-Pierce Oil Co. v. Texas,* 212 U. S. 112, 118." (Italics ours).

And in *Consolidated Turnpike Co. v. Norfolk & O. V. Ry. Co.,* 228 U. S. 326, the opinion of Mr. Justice Lurton (quoted on page 15 of respondents' brief) states:

> "Nothing is better settled than that it is too late to raise a Federal question for the first time in a petition for a rehearing, after the final judgment of the state court of last resort. *If, however, the state court actually entertains the petition and decides the Federal question, and this appears by the record, the requirement of sec. 709, that the right shall be specially set up and denied, is complied with. McCorquodale v. Texas,* 211 U. S. 432, 53 L. ed. 269, 29 Sup. Ct. Rep. 146; *Mallett v. North Carolina,* 181 U. S. 589, 45 L. ed. 1015, 21 Sup. Ct. Rep. 730, 15 Am. Crim. Rep. 241; *McMillen v. Ferrum Min. Co.,* 197 U. S. 343, 347, 49 L. ed. 784, 787, 25 Sup. Ct. Rep. 533." (Italics ours).

Respondents argue that the modifying order of the Supreme Court of Pennsylvania dated December 16, 1930, denying reargument "expresses no more than would be implied from a simple denial of the motion." Such a contention is nothing short of frivolous. The Supreme Court of Pennsylvania in its order denying reargument stated that "upon consideration" of the petition for reargument, "the court being of opinion that the plan of assessment in these cases does not vio-

late the equal protection clause of the Fourteenth Amendment to the Constitution of the United States, reargument is refused." It would be difficult to imagine how the Pennsylvania court could more clearly have indicated its consideration of the Federal question, nor how it could have "passed upon" the Federal question more definitely than by expressing its "opinion" with regard to it, and basing its denial of reargument upon its opinion with respect to the Federal question. Had the Supreme Court of Pennsylvania intended that its order refusing reargument should be considered as a "simple denial" it would certainly have permitted the original order of December 8th, which merely denied reargument without stating any reasons, to stand.

POINT 3.

In Reality the Federal Question Was Involved in These Cases Both in the Court of Common Pleas of Greene County and in the Supreme Court of Pennsylvania.

Respondents seek to give the impression that some new and startling question of Federal constitutional law was first injected into these cases in the petition for reargument in the Supreme Court of Pennsylvania. We have already endeavored to show that even if this be true, this Honorable Court has jurisdiction to review the Federal question by reason of the action of the Supreme Court of Pennsylvania in expressing an opinion upon it. But in reality the assertion by petitioners of impairment of right under the equal protection clause of the Federal Constitution introduced no new question into these cases. The question from the very outset was whether the valuations which the County Commissioners, sitting as a Board of Revision, placed upon petitioners' properties were relatively so unequal in pro-

portion to actual values as to lack uniformity and constitute an unlawful discrimination. The attack of petitioners through the Pennsylvania courts was primarily directed to the plan of assessment followed by the Board of Revision. The petitions and appeals from the Board of Revision to the Court of Common Pleas of Greene County alleged as grounds of complaint that (R. 5-6):

> "4. Your petitioner avers that said assessment is unjust and inequitable for the following reasons:
>
> "(a) Said Assessors and Commissioners have discriminated against your petitioner in favor of the owners of other classes of taxable property within said county by assessing the coal of your petitioner at a higher relative rate than the other classes of real estate are assessed, and as a result the said coal of your petitioner will be required to pay an unjust, unfair and undue proportion of the taxes levied and assessed by the Commissioners of said County and by the School Directors and Supervisors of said Township.
>
> "(b) *The valuation placed upon said coal of your petitioner is unjust, inequitable, discriminatory and lacks uniformity, as the said Commissioners have assessed all coal in the same township* (except what is termed 'active coal') *at the same valuation, regardless of the remoteness or accessibility of the said coal to market, cost of operation, or means of transportation and regardless of the difference in value and without due regard to the valuation and assessment of other coal* and other classes of real estate in the County of Greene." (Italics ours).

Likewise the assignments of error in the Supreme Court of Pennsylvania were directed primarily to the al-

leged discriminatory nature of the plan of assessment followed by the Board of Revision, and the action of the Trial Court in approving it. Thus in the appeal of Cumberland Coal Company in Cumberland Township, the first assignment of error was (R. 482-483):

> "First. The Trial Court erred in approving the action of the Township Assessors and County Commissioners, sitting as a Board of Revision, in assessing all bituminous coal in the Pittsburgh or River vein within the territorial limits of the Township of Cumberland at the same value, disregarding differences in actual or market values by reason of great differences of distance from the river or rail transportation and other factors entering into values, where it is undisputed that the actual or market value of the coal varies throughout the township and the coal fronting on the river and railroads possesses a value twice that of the coal lying back from the river and extending to a distance of 9 or 10 miles."

The first assignment of error in each of the other cases is similar to the one just quoted.

In the Supreme Court of Pennsylvania petitioners stated the first and primary question involved (as appears from page 20 of the brief of respondents in support of their motion to dismiss and affirm) as follows:

> "1. May Township Assessors and County Commissioners sitting as a Board of Revision, lawfully assess all bituminous coal in the Pittsburgh or river vein within the territorial limits of a township at the same value, disregarding differences in actual or market values by reason of great differences of distance from the river or rail transportation and other factors entering into values, where it is undisputed that the actual or market value of

> the coal varies throughout the township and that the coal fronting on the river and railroads possesses a value twice that of the coal lying back from the river and extending to a distance of 9 or 10 miles?"

The Supreme Court of Pennsylvania in its opinion (R. 602, 603) answered the foregoing question in the affirmative and sustained the assessments without mentioning either the Constitution of Pennsylvania or the Constitution of the United States. In fact we know of no place in the record prior to the petition for reargument where either the State or Federal Constitution is expressly mentioned. This occurred, we believe, because there was not, and could not at this stage in the history of our constitutional law, be any doubt in the minds of court or counsel that the validity of the plan of assessment was to be examined and tested by the fundamental requirements of *substantial equality and uniformity* and freedom from *undue discrimination.* By these settled standards the issues in the case were tried and determined in the courts of Pennsylvania; by these same standards the issues will be determined in the Supreme Court of the United States.

Under the facts and circumstances to which we have referred, we deem it unnecessary to reply at length to respondents' third and final point made in their argument, to the effect that, "Error not assigned is not open to review in the Supreme Court of Pennsylvania." That rule of state appellate practice was for the Pennsylvania Supreme Court to invoke if it deemed the doctrine applicable. The state appellate court treated the Federal question as properly raised, and proceeded to consider and decide it; and such action, under the various decisions of this Court already cited by us, clearly estab-

lishes the basis for review by the Supreme Court of the United States.

III.

CONCLUSION.

In conclusion, we earnestly contend that if any doubt exists as to the jurisdiction of the Supreme Court of the United States to issue the writs of *certiorari* in these cases, that doubt should, in this instance, be resolved in favor of permitting the writs of *certiorari* to stand, for the reason that this is a dispute, not between private individuals, but between property owners and the taxing authorities of their sovereign state. We assume that the taxing officials, who have sworn to uphold the Constitution of the United States, are no less zealous than are petitioners to see that their acts as public officials shall not violate the Constitution, and that petitioners and their other constituents shall be accorded every protection which the Constitution of the United States affords. At the very outset of its opinion in these cases the Supreme Court of Pennsylvania stated that "the proper assessment of coal lands has been one of the most perplexing governmental questions with which the Courts of this Commonwealth have had to deal." What could be of greater aid to the Pennsylvania Courts and taxing authorities in working out the ultimate solution of this "perplexing" problem than an expression of opinion from this Court as to whether the system of assessment violates the fundamental law of the land?

Under all the circumstances to which we have referred, and more especially under the settled law as laid down by this Court, petitioners respectfully submit that they should be permitted an opportunity to plead

their fundamental rights before this Honorable Court, and that the motion of respondents to dismiss the writs of *certiorari* and affirm the judgment of the Supreme Court of Pennsylvania should be denied.

Respectfully submitted,

WILLIAM A. SEIFERT,
ARTHUR B. VAN BUSKIRK,
Counsel for Petitioners.

W. J. KYLE,
CARL E. GLOCK,
Of Counsel.